

**P H Nursing Home, Inc. and United Food and Commercial Workers Union, Local 1529.** Cases 26–CA–17726, 26–CA–17751, 26–CA–17786, and 26–RC–7849

September 28, 2000

DECISION, ORDER, AND DIRECTION OF  
SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX  
AND HURTGEN

On July 8, 1997, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order as modified.<sup>2</sup>

Contrary to our dissenting colleague, we agree with the judge that the Respondent unlawfully threatened employees with adverse changes in working conditions if they supported the Union. Specifically, Supervisor Emma Riddley told employee Rowena McLain in front of a number unit nurses that there would be changes in the call-in policy: employees would no longer be allowed to call in. Nothing in Riddley's remarks suggested that she was in any way confining the meaning of her words to the role that the Union might play as the employees' collective-bargaining representative with respect to call-in policy. In this regard, *Tri-Cast, Inc.*, 274 NLRB 377 (1985) (employees' history of "work[ing] on an informal and person-to-person basis" called into question when a statutory representative is selected), and *Hyatt Regency Memphis*, 296 NLRB 259 (1989) (practice of going directly to supervisors with employee problems identified as the cost of unionization) are distinguishable. We thus reject the dissent's comparison of the Riddley comments to innocuous statements regarding

loss of access to management. Accordingly, we find, consistent with the judge, that the Respondent has violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, P H Nursing Home, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

Substitute the following for paragraphs 2(c), (d), and (e).

"(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of back-pay due under the terms of this order.

"(d) Post at its Jackson, Mississippi facility copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 1, 1996.

"(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

IT IS FURTHER ordered that the election in Case 26–RC–7849 shall be set aside, and this case is remanded to the Regional Director for Region 26 to conduct a new election at a time and place determined by him.

[Direction of Second Election omitted from publication.]

MEMBER HURTGEN, dissenting in part.

I agree with my colleagues that the Respondent has violated Section 8(a)(1) by implementing and enforcing an unlawful no-solicitation/no-distribution rule, threatening employees with discipline for passing out union lit-

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that a bargaining order is not warranted in this case, we do not rely on the closeness of the vote in the election or the fact that no unfair labor practices were committed in the weeks preceding the election.

<sup>2</sup> We have modified the judge's Order to comply with the Board's decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), as modified by *Excel Container, Inc.*, 325 NLRB 17 (1997).

erature, and interrogating an employee about her union activity. I also agree that the Respondent violated Section 8(a)(3) and (1) by suspending and discharging Felicia Jackson.

I do not, however, agree that the Respondent violated Section 8(a)(1) by threatening employee Rowena McLain with adverse working conditions if the Respondent were unionized.

The judge found that Staffing Coordinator Emma Riddley made this alleged threat during a conversation with a number of morning-shift nurses in the staff lounge. During the conversation, Riddley referred to union activity at another nursing home and raised the issue of the Respondent's call-in policy. Riddley said that "with the Union in the facility[,] we [i.e., employees] would not be able to call in like we had before." Riddley said that employees would have to "go through something like a third party or a mediator." The judge found that Riddley's remark was an unlawful threat. I disagree.

In *Tri-Cast, Inc.*, 274 NLRB 377 (1985), the Board held that statements concerning employee loss of direct access to management in the event of unionization do not constitute threats. Rather, they "simply [explicate] one of the changes which occur between employers and employees when a statutory representative is selected." Id. at 377. This proposition is true even if the employer has committed other unfair labor practices. See *Hyatt Regency Memphis*, 296 NLRB 259 fn. 3 (1989). Contrary to my colleagues, I conclude that Riddley was simply giving her view as to the role that the Union would play as a bargaining representative. Riddley was not threatening that these perceived consequences would be a company retaliation for a union victory. The fact that Riddley's view may be incorrect does not transform that view into a threat.

*Michael W. Jeannette, Esq.*, for the General Counsel.

*William I. Gault Jr., Esq.* and *David M. Thomas, Esq.*, of Jackson, Mississippi, for the Respondent.

*Roger K. Doolittle, Esq.*, of Jackson, Mississippi, for the Charging Party.

#### DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. This matter was heard in Jackson, Mississippi, on April 14, 15, and 16, 1997. The charge in Case 26-CA-17726 was filed on October 29, 1996. The charge in Case 26-CA-17751 was filed on November 14, 1996. The charge in Case 26-CA-17786 was filed on December 10, 1996. A consolidated complaint issued on December 20, 1996. The petition in Case 26-CA-7849 was filed on September 16, 1996, seeking representation of a bargaining unit including full and part-time certified nursing assistants (CNA), housekeeping, laundry, dietary, and janitor/maintenance employees. An election was held on November 8, 1996. Of 68 eligible voters 24 voted for the Union, 26 voted

against the Union, and there were 2 challenged ballots. The Union filed objections. A report on objections issued on December 20, 1996. Some of the objections were dismissed and others found to be coextensive with the unfair labor practices allegations in the unfair labor practice charges included herein.

Respondent, the Charging Party, and the General Counsel were represented and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent and the General Counsel filed briefs. Upon consideration of the entire record and briefs, I make the following findings.

#### I. JURISDICTION

Respondent is a corporation with an office and place of business in Jackson, Mississippi, where it is engaged in a nursing home operation providing inpatient medical care. During the 12-month period ending November 30, 1996, Respondent derived gross revenues in excess of \$100,000 and purchased and received at its Jackson, Mississippi facility, goods and services in excess of \$50,000 directly from points outside the State of Mississippi. The parties stipulated and I find that Respondent has been an employer engaged in commerce.

#### II. LABOR ORGANIZATION

The parties stipulated and I find that the Charging Party (the Union) has been a labor organization at material times.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

Robert Ellis, organizing director for UFCW Local 1996, Atlanta, Georgia, and formerly executive assistant to the regional director, Region 3, UFCW, testified that the Union conducted organizing campaigns from July 1996 among 12 nursing homes in Jackson, Mississippi, including Respondent. The first union meeting among employees was held around July 28 or 29, 1996. Felicia Jackson was the only employee of Respondent that attended that meeting.

Rowena McClain, a CNA, has worked for Respondent since August 1996. McClain testified that Administrator Elaine Lee spoke to the employees during employee meetings during the union campaign. Lee told the employees that they did not want a union in the facility and that they would fight it tooth and nail if the employees tried to get one in.

##### A. 8(a)(1) Allegations

##### 1. By Director of Nursing Sharon Albritton

(a) Implementing an illegal no-solicitation and no-distribution rule; (b) disparately applying its no solicitation and no distribution rule; (c) threatened employee with discipline if employee solicited or distributed on behalf of the Union; and (d) interrogated an employee about union activities.

In August 1996, Felicia Jackson was called to see Assistant Director of Nursing Marilyn Simmons. Simmons told Jackson that Director of Nursing Sharon Albritton wanted to see Jackson about the union buttons and stuff but that Jackson should not let on that she knew what Albritton wanted. Later that day Jackson met with Albritton in Albritton's office. Sharon Albritton asked Jackson if she had been distributing union material. Jackson replied that she had. Albritton asked if Jackson was aware that she could not do that while Jackson was on the

clock. Jackson replied that she had not been on the clock but that she had distributed union materials when she first came in the building. Sharon Albritton then told Jackson that she could not distribute union materials on the premises. Albritton said they did not need a union. She also said that Jackson could not be reading union materials there on the job. Felicia Jackson replied that Albritton could not tell her what she could or could not read. Albritton told Jackson that she would get back to Jackson about that. She told Jackson that if Jackson continued to pass out union materials she would be written up.

Jackson has sold things while at work including candy for her son's band. Albritton was one of the people at work that bought candy from Felicia Jackson.

Sharon Albritton testified that employees are permitted to solicit during their nonworking time. For example, employees are permitted to solicit the sale of Girl Scout cookies and employees are also permitted to solicit for a union provided the solicitation in either case is during breaktime, mealtimes, and other nonworking hours such as before and after work.

Albritton recalled that Felicia Jackson asked her during the union campaign in the summer of 1996 what the policy was regarding handling paper and discussing the Union. Albritton told Jackson that she was not 100 percent sure of the policy but that she would check and get back with Jackson. After Albritton checked with Elaine Lee she went back and told Jackson that they could handle or discuss union materials provided it was on break, during meals, before or after work. According to Albritton employees continued to engage in the solicitation and distribution of union materials after her conversation with Felicia Jackson.

Sharon Albritton denied that she ever did anything to interfere with the solicitation or distribution of union literature. She testified that she saw union pamphlets in the facility during the union campaign.

Albritton denied that she had a conversation with Felicia Jackson regarding reading the Jackson newspaper. Employees are permitted to read newspapers during breaktimes. She also denied that she did anything to interfere with employees wearing union buttons.

Administrator Elaine Lee testified that she is the person in charge of Respondent's nursing home. She reports to Polly Darnall, chief of operations for Right Care, Incorporated. She testified that Respondent does not have a written no-solicitation/no-distribution rule but employees are permitted to sell things like Girl Scout cookies provided it is not done during working time. Director of Nursing Sharon Albritton came to her on one occasion and asked about that rule. She told Albritton that solicitation is permitted during nonwork times.

Lee testified that employees did distribute union materials in the nursing home and that no one was prevented from distributing those materials and no one was disciplined for distributing union materials.

Rowena McClain testified on cross-examination that while she was wearing a union button at work in staffing coordinator Emma Riddley's office, Riddley asked her what she was "doing with that pin on?" McClain replied that she had signed a union card and was given the union button. Riddley told her that she "don't need to have that on; that is for the Union."

Sharon Albritton denied that she interrogated any employee regarding the employee's union activities.

#### Findings

##### Credibility

In view of her demeanor and the full record I credit Felicia Jackson's account of her conversation with Sharon Albritton in August 1996. Jackson's testimony that Assistant Director of Nursing Marilyn Simmons told her that Sharon Albritton wanted to see Jackson about the union buttons is not denied. Marilyn Simmons did not testify. In consideration of her demeanor and the record I do not credit the testimony of Sharon Albritton to the extent her testimony conflicts with that of Felicia Jackson and other credited evidence. I also credit the testimony of Rowena McClain that she was asked by Staffing Coordinator Emma Riddley, "[W]hat she was doing with that (Union) pin on" and that Riddley told her that she did not need to have on the union pin. I make that determination on the basis of the entire record and McClain's demeanor.

##### Conclusion

The General Counsel argued that Respondent by Albritton's comments to Felicia Jackson engaged in conduct in violation of Section 8(a)(1) by implementing an overly broad no-solicitation and no-distribution rule (*Fairfax Hospital*, 310 NLRB 299, 301 (1993); *Goldtex, Inc.*, 309 NLRB 158, 160 (1991), *enfd. mem.* (4th Cir. 1994)); by disparately applying its no-solicitation and no-distribution rule in order to discourage employees from assisting the Union (*Be-Lo Stores*, 318 NLRB 1, 12 (1995); by threatening Jackson with discipline if she continued to engage in lawful union activity (*Fieldcrest Cannon*, 318 NLRB 470, 519 (1995); and by unlawfully interrogating Jackson about her union activities (*Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Goldtex*, *supra* at 160).

In consideration of the credited testimony of Felicia Jackson and Rowena McClain, I find that Director of Nursing Sharon Albritton unlawfully interrogated Jackson about her union activities in August 1996 when she asked Jackson if she had been distributing union materials. At the time of that conversation the union organizing campaign had just started at Respondent nursing home and it was not shown that Felicia Jackson was a known union advocate engaged in solicitation and distribution of union materials while she was on the clock. The record illustrated that Respondent and in particular Director of Nursing Albritton took a strong position in opposition to the Union. The information sought by Albritton included all union activities by Jackson on the clock or on the premises. Albritton was the highest-ranking supervisor in the nursing department which included all nurses and CNAs. The record is unclear as to whether Jackson responded truthfully to Albritton. Respondent introduced evidence showing that Jackson successfully solicited authorization cards during working time. That tends to show that Jackson was not fully candid in her response to Albritton. There was no showing that Respondent had a valid purpose in seeking to determine the full extent of Felicia Jackson's on-premises union activity. Albritton did not tell Jackson why she needed the information and she did not assure Jackson

against reprisals. *Cooper Tire & Rubber Co. v. NLRB*, 957 F.2d 1245, 1255–1256 (5th Cir. 1992).

I find that Sharon Albritton informed Jackson that Respondent had an illegal overly broad no-solicitation, no-distribution rule by telling Jackson that she could not solicit or distribute union materials while on the clock or distribute union materials on the premises. The credited testimony of Jackson and McClain proved that Respondent, through Sharon Albritton, applied its no-solicitation/no-distribution rule in a disparate manner by prohibiting solicitation and distribution for the Union while on the clock and while on the premises even though it permitted other solicitation and distribution such as the sale of Girl Scout cookies. The evidence proved that Sharon Albritton unlawfully threatened Felicia Jackson with a writeup if Jackson continued to pass out union materials.

## 2. By Staffing Coordinator Emma Riddley

### Threatened Employee with Adverse Changes in Working Conditions

Rowena McClain, a CNA, has worked for Respondent since August 1996. McClain testified about a conversation she and CNA LaBrenda West had with Staffing Coordinator Emma Riddley in early October 1996 in the employee lounge of Respondent's facility. Riddley told them that she knew that LaBrenda West had dealings with the Union at Crawford. Crawford is another nursing home. LaBrenda asked how did Riddley know that and Riddley said that she had her ways of getting information. Riddley said that "with the Union in the facility we (the employees) would not be able to call in like we had before." Riddley said that the employees would have to go through something like a third party rather than calling in early.

McClain testified on cross-examination that while she was wearing a union button at work in Emma Riddley's office, Riddley asked her what she was "doing with that pin on?" McClain replied that she had signed a union card and was given the union button. Riddley told her that she "don't need to have that on; that is for the union."

Emma Riddley testified that Respondent has a written rule requiring employees to call in prior to an absence. She recalled there were 2 writings, one that required call in 4 hours and the other 2 hours, before the start of the shift. Riddley testified that she elected to go with the 2-hour call-in requirement. On one occasion she was explaining the policy to a new employee, LaBrenda West, and other employees were present. She told West that Respondent was strict on its rules requiring reporting on time, taking no more than the scheduled break and not leaving until the scheduled end of the shift. The other employees present included Rowena McClain, May Garner, and other employees. One of the employees commented that if they voted the Union in they would not have to come in on time. Emma Riddley told the employees that according to the contract that she had read they would still be required to come to work on time. Riddley was referring to the contract between the Union and Crossgate Manor that was available in the breakroom (R. Exh. 4). Riddley denied that she threatened to change Respondent's call-in policy. She did tell the employees that the policy had been there a long time and she would be enforcing Respondent's call-in policy. Riddley denied that she enforced that

policy differently after the beginning of the union organizing campaign. She has also continued to enforce the employees' attendance policy as she did before the union campaign.

Riddley denied that she has ever called an employee into her office or in the breakroom for a discussion. She was afraid to try to answer employees' questions and she would leave her office whenever employees came in. She denied saying anything to Ms. West about West's involvement with the Union at Crawford Nursing Home. Riddley admitted that West did hold a second job at Crawford. Riddley denied knowing whether there was a Union at Crawford Nursing Home.

## Findings

### Credibility

In consideration of the record and her demeanor I find that I am unable to fully credit the testimony of Emma Riddley. I found her testimony that she did not notice any employees wearing union buttons to be especially incredible.

As shown above I do credit the testimony of Rowena McClain.

## Conclusion

The General Counsel argued that Riddley implied that she had modified Respondent's policy regarding calling in from 4 to 2 hours before the shift and that employees would be subjected to a change in that policy if they selected the Union (*Federal Stainless Sink*, 197 NLRB 489, 491 (1972); *Flexsteel Industries*, 316 NLRB 745 (1995)).

The credited testimony of Rowena McClain proved that Respondent, through Emma Riddley, did threaten employees that they would not be allowed to phone in as they could under current policy if the Union was selected. Riddley threatened the employees that with the Union in they would have to go through the third party. Those comments constitute unlawful conduct in violation of Section 8(a)(1) of the Act.

## 3. By Chief Operating Officer Polly Darnall

Polly Darnall, the chief operating officer of Right Care, testified that Right Care operates 18 nursing homes including Respondent facility. She testified that she met with the employees during the union organizing campaign. On October 15 and 16, 1996 she read a speech to the employees. General Counsel Exhibit 2 is that speech. A video recording was played to the employees during a break in Darnall's speech.

## Solicited grievances from employees

### Threatened Employee with Unspecified Reprisals

The General Counsel pointed to page 3 of Darnall's written speech to the employees as demonstrating comments in violation of Section 8(a)(1) (GC Exh. 2), where she made the following comments:

I think it is not only to your (the employees') benefit, but also to ours to know what the problems are in our facility. Communication, however, is a two-way street. The Administration has to listen to you, and you have to be willing to listen to the Administration. I have asked you to give us a chance and to put your trust in us and not this Union. I hope you will do this.

If you put your trust in me and the Administration of this facility, you will not regret your decision.

#### Findings

##### Credibility

There is no dispute but that the above language was included on page 3 of Polly Darnall's speech.

##### Conclusion

General Counsel argued that Darnall's comments regarding open communications that that employees will benefit if management knows the problems, constitute efforts to ascertain employees' grievances and her statement that employees should give management a chance, equates to an implied promise to remedy the problems (*Performance Fiction Corp.*, 319 NLRB 859, 870-871 (1995); *Fieldcrest Cannon*, supra at 519-521). General Counsel contends that Darnall's comment that employees will not regret their decision to trust Respondent implies that Respondent will regard employees' decision to support the Union as not trusting Respondent (*Adam Wholesalers*, 322 NLRB 313 (1996)).

Despite what Darnall said in her speech there was no showing that a procedure was established for the receipt of grievances. The employees were not shown to have been asked at any specific time during or after the speech to either speak out or communicate their grievances in any other manner. The evidence shows that Darnall's comments were nothing more than rhetorical. Moreover, I see nothing in Darnall's speech that could be construed as a threat of unspecified reprisals. The comment that the employees will not regret putting trust in the administration when read in the entire speech does not carry an implication that employees will regret putting their trust in the Union. *Westek, Inc.*, 316 NLRB 98, 101 (1995). Additionally, the speech included Darnall's statement to the employees that she could not make any promises. *Trump Plaza Associates*, 310 NLRB 1162, 1166 (1993). I find that Respondent did not engage in unlawful conduct as alleged in this instance. *Harper Collins of San Francisco*, 317 NLRB 168, 172, 180 (1995); *Columbian Rope Co.*, 299 NLRB 1198, 1201 (1990).

#### 4. By Housekeeping Supervisor Eileen Wilson

##### Restricted an Employees Movements Because of Her Union Activities

Mary Williams testified that she has worked for Respondent in housekeeping on and off since 1989. Eileen Wilson is her supervisor. Williams testified that she went into the kitchen to get clean cups a few days before the NLRB election. Pujol, a supervisor of the kitchen was present along with others in the kitchen. Williams knocked on the door and no one responded. She then walked in and asked for some clean cups. No one responded and she repeated her request louder. She was told to hush and to get out of the kitchen, that she was not supposed to be there. Williams picked up two cups. Williams testified that she was looking for cups for a patient. After she left Williams was paged but she did not respond.

Supervisor Eileen Wilson told Mary Williams that Pujol had paged Williams. Wilson said that Pujol asked her to tell Williams to stay out of the dietary disturbing "Pujol's girls" be-

cause Williams was back there talking about the Union. Williams testified that she had not been talking about the Union in the kitchen.

Williams admitted there is a rule prohibiting anyone other than dietary employees from entering the kitchen and that she has been told that she was not supposed to be in the kitchen. However, she frequently would go back there to help. Pujol had told her to go ahead and come in the kitchen. Williams admitted there were no nondietary employees in the kitchen on the occasion when she was cautioned against coming into the kitchen and she testified that she was on break when she went to the kitchen.

CNA Mary Howard testified that Respondent has a rule that only dietary employees may go in the kitchen. However, when asked about anything in writing, Mary Howard testified that there was a sign on the door saying "employees only."

Administrator Elaine Lee testified that Respondent has a written rule that only dietary employees are allowed in the kitchen.

Eileen Wilson, manager over housekeeping and laundry, testified that she received a phone call from Pujol about Williams being in the kitchen and disrupting the dietary employees. Pujol said that it was against infection control regulations for Williams to be in the kitchen. Wilson went to Williams and told her to please stay out of the kitchen. Wilson denied that she restricted any employee because of the Union.

A representative of the Mississippi Department of Health testified that their regulations prohibit anyone other than dietary employees and administrators from entering food service areas.

Virgie M. Jackson testified that she is a rehab CNA for Respondent. Jackson testified that Respondent has a standing rule that any employee other than those that work in the kitchen, are not allowed to go in the kitchen.

#### Findings

##### Credibility

Here the matter in dispute involves whether Eileen Wilson directed Mary Williams to stay out of the kitchen because she was in there talking about the Union. In regard to that question only I am unable to discredit the testimony of Eileen Wilson. Wilson appeared to testify truthfully. In consideration of her demeanor and the full record I credit her testimony and do not credit the conflicting testimony of Mary Williams.

##### Conclusion

The General Counsel argued that even though Respondent published a prohibition against nondietary employees entering the kitchen, that rule was not routinely followed and Respondent discriminatorily applied the prohibition against Williams because she was thought to be in the kitchen talking about the Union (*Laser Tool*, 320 NLRB 105, 109 (1995)). General Counsel argued that Respondent's own witness, Mary Howard, rebutted its contention that only kitchen employees are permitted in the kitchen.

However, in view of my credibility determinations, I find that General Counsel failed to prove that Mary Williams was restricted from the kitchen because of the Union. Mary Williams testified that she was not talking about the Union while

she was in the kitchen. Eileen Wilson credibly testified that she did not say anything to Williams about her being in the kitchen talking about the Union. I find that the evidence failed to prove that Respondent restricted employees because of the Union.

*B. The 8(a)(3) Allegations*

*Suspended and Discharged Felicia Jackson*

Felicia Jackson started working for Respondent in December 1992. She was a CNA on the 7 a.m. to 3 p.m. shift. CNAs are charged with taking care of patients (frequently called residents) including bathing, dressing, feeding, and exercising the patients. CNAs were normally assigned 10 patients. Jackson reported to a charge nurse.

Jackson was involved in the union organizing campaign. She solicited employees to sign authorization cards; she distributed pronoun organizing materials at work; wore union buttons to work beginning on July 26, 1996, and was seen with the button by supervisors including Elaine Lee; she attended union organizing meetings; and she was the union observer at the NLRB conducted election. The evidence illustrated that Felicia Jackson was the most prolific solicitor of union authorization cards.

Felicia Jackson was asked by CNA Mary Tutson for some union authorization cards so that Tutson could solicit employees on the evening shift. Subsequently Jackson asked Tutson for the return of those cards. Tutson replied they were at home. She never returned the cards to Jackson. Tutson subsequently served as the Respondent's election observer at the NLRB conducted election.

Virgie Jackson has worked for Respondent as a rehab CNA for about 2 years. She attended two union meetings with Felicia Jackson. She saw Felicia Jackson wear a union button at work. Felicia Jackson wore her union button just below her name tag.

Union Organizing Director Robert Ellis was the executive assistant to the union regional director at the time of the 1996 union campaign. Felicia Jackson was the only employee from Respondent to attend one of the first union meetings in Jackson, Mississippi. Ellis gave Felicia Jackson one of the Union's organizing packets that included a know your rights document, some documents from the NLRB about conducting a fair election, an authorization card and a new initiation dues card.

Ellis explained to Felicia Jackson that the authorization cards were the employees' authorization for the Union to represent them and that an employee did not become a member of the Union by signing an authorization card.

As shown above, I credited evidence showing that Jackson was called into see Assistant Director of Nursing Marilyn Simmons in August 1996. Simmons told Jackson that Director of Nursing Sharon Albritton wanted to see Jackson about the union buttons and stuff but that Jackson should not let on that she knew what Albritton wanted. Later that day Jackson met with Albritton in Albritton's office. Sharon Albritton asked Jackson if she had been distributing union material. Jackson replied that she had. Albritton asked her if she was aware that she could not do that. She told Jackson that she could not do that while Jackson was on the clock. Jackson replied that she had not been on the clock but that she had distributed union materials when she first came in the building. Sharon Albritton then told Jackson that she could not distribute union materials

on the premises. Albritton said they did not need a union. She also said that Jackson could not be reading union materials there on the job. Felicia Jackson replied that Albritton could not tell her what she could or could not read. Albritton told Jackson that she would get back to Jackson about that. She told Jackson that if Jackson continued to pass out union materials she would be written up. Jackson testified that she did not pass out union literature on the premises after that conversation with Albritton.

About October 4, 1996, Felicia Jackson received a phone call at work around 1 p.m. that her sister was hospitalized and that Jackson was needed at the hospital. Jackson told Staffing Coordinator Emma Riddley what had occurred. Riddley told Jackson to take care of Jackson's patients and to tell her charge nurse and her coworkers that she was leaving. As Jackson left the nursing home she saw Elaine Lee. Lee said that she hoped Jackson's sister gets better.

When Jackson came to work the next day she saw Charge Nurse B. J. Adams in the dining room. Jackson told Adams about her sister and that she needed to leave early that day. Jackson told Adams that she needed to leave to relieve her mother at the hospital about 1 p.m. Adams told her that Jackson had to talk to her supervisor. Jackson saw supervisor Annie Wilson and told her what had occurred the day before. Jackson asked Wilson if she could leave early that day. Wilson told her to go back to her charge nurse, clear it with the charge nurse and make sure that her coworkers would take care of Jackson's patients. Jackson said that Wilson did not tell her to return and see Wilson. The charge nurse was B. J. Adams. Jackson went back to Adams, and told her that Annie Wilson had said she could leave early if she finished her work, cleared leaving early with Adams and made sure the other CNAs took care of Jackson's patients. Adams said that it was okay with her for Jackson to leave early.

Around 9 or 9:30 a.m. Jackson phoned her mother at the hospital and learned that no one was sure what was causing the sister's illness. Her mother told Jackson that she needed to return to the hospital.

Around 10:30 a.m. Jackson told B. J. Adams that when she finished with patient King she would be leaving because she had finished her workload. Adams told her that was okay. Two CNAs, Mae Garner and Catherine Claiborne, helped Jackson get King in a whirlpool. Jackson told the CNAs that she was real tired and was going home early if they would take care of her patients. Garner and Claiborne indicated they would care for Jackson's patients. Jackson recalled that she had only seven or eight patients that day.

After finishing with King, Jackson went to find the charge nurse. B. J. Adams was not at the station. However Charge Nurse Margaret Freeman was there. Jackson told Freeman that she was finished. Jackson testified that Freeman replied, "[O]kay and she hopes my sister feels better, and I told her I was leaving." Jackson recalled that conversation occurred at 11 a.m. She was originally scheduled to work until 3 p.m. that day.

Sharon Albritton was notified by RN (supervisor) Annie Wilson that Felicia Jackson left the facility around 11 a.m. on October 5, 1996, even though she had permission only to leave at 1 p.m. Albritton contacted Elaine Lee and Emma Riddley and informed them of the incident. She then phoned Annie

Wilson and told her to have everyone available to speak with Albritton. Albritton asked that all supervisors document what had occurred regarding Felicia Jackson leaving early.

On the evening of October 5, around 9 or 9:30 a.m., Jackson received a phone call from Emma Riddley. Riddley asked her what mess had she been carrying on over at the nursing home. Jackson asked Riddley what she meant but Riddley did not reply. Riddley said, "Well, I'm sorry, Felicia, but you've been suspended and you have to be at the nursing home Monday about 1:30 p.m. to have a meeting with Ms. Lee and Ms. Albritton." Before that call Jackson had been scheduled to work on Monday, October 7.

Emma Riddley testified that Annie Wilson phoned her on October 5, 1996, regarding Felicia Jackson leaving work early. Wilson asked Riddley about the procedure that employees were required to follow when they abandoned their patients. Riddley told Wilson to phone Albritton. Riddley tried without success to have someone come in to replace Felicia Jackson. Riddley testified that she phoned Felicia Jackson that night and told Jackson that she had replaced her for the next 2 days and that Jackson was to attend a meeting with Albritton and Lee on Monday. Riddley testified that she does not think she knew of Felicia Jackson's union activities at that time.

Felicia Jackson reported to Lee's office on October 7. Elaine Lee told Jackson that she was sorry but that Jackson was fired. Sharon Albritton told Jackson that she was fired for patient abandonment and leaving the premises without permission and that they found some discrepancies in the time that Jackson left. Jackson asked how that could be when her timecard plainly stated the time she left. Albritton told Jackson that she had writeups against Jackson from Annie Wilson and B. J. Adams. Jackson asked to see the writeups but Albritton told her that she could not see them. Albritton handed Jackson a completed personnel action report and asked Jackson to sign. Jackson replied that the report represented a lie and she could not sign it. Lee told Jackson that she hated to lose Jackson because she was a good worker but due to company policy she could not keep her. Jackson asked for a copy of the disciplinary action report of her discharge (GC Exh. 10) but was told she could not have a copy.

Jackson testified that she followed established practices in leaving early on October 5. She followed the same procedure on numerous occasions before that date and had never been disciplined because of leaving on those occasions. Jackson recalled there were several other employees that left the facility and were not fired. Those included Mary Bingham.

Bettye J. (B. J.) Adams worked for Respondent from February 1993 until October 14, 1996. She also worked for a temporary service when she was not on duty with Respondent. She was a LPN charge nurse for Respondent. Adams recalled that during the 1996 union campaign supervisors, including Sharon Albritton, talked about the Union.

Adams testified that Felicia Jackson talked with her on October 5, 1996. Jackson came to her in the dining room that morning and told her that she was going to ask Supervisor Annie Wilson if she could leave early. Adams told Jackson that was fine with her if Jackson did her work. Adams testified that Jackson left to speak to Annie Wilson.

Between 8 and 8:30 a.m. Felicia Jackson came back to Adams and told her that she had talked with Annie Wilson and that Wilson said it was okay for her to leave early if she checked with "us." Jackson said that Wilson said it was okay for her to leave at 1 p.m.

Around 10 a.m. on October 5, B. J. Adams saw Felicia Jackson talking on the phone. Jackson subsequently told Adams that she was on her last patient, King, and that she needed for Adams to put medicine on King's foot. While Adams was applying the medicine to King's foot, Jackson told her that Annie Wilson had said that she could leave at 1 p.m. but she needed to leave earlier. Adams replied that was fine as long as Jackson finished her patients. Jackson told Adams that she had talked to the other CNAs and they did not have a problem with her leaving early.

CNA Mae Etta Garner testified that she was working with Felicia Jackson in the shower room on October 5, 1996. Between 10 and 10:30 a.m. Jackson told Garner that she was sick and was going home after the two of them finished the patient they were working with.

B. J. Adams testified that later, before lunch, Freeman told her that Jackson had said that she was leaving.

Although CNAs have 10 patients normally, Jackson had only about 7 or 8 that day.

Adams testified that she followed her normal routine of re-assigning Jackson's residents, to the other CNAs after Jackson left early on October 5.

Adams saw Annie Wilson after Jackson left. Wilson told her that Felicia did not come back to her even though she had asked Jackson to check with her before leaving. Adams said that Freeman let Jackson go and there was no reason for Jackson not to leave. Wilson said that she felt she should call Albritton. Adams asked why and Wilson said that Jackson had left at 11 pm after clearing leaving at 1 p.m.

Around 1:30 p.m. Sharon Albritton phoned Adams. Adams told Albritton that she did not have a problem with Jackson leaving at 11 a.m. instead of 1 p.m. because Jackson had finished her work and Adams and the other CNAs had the situation covered. Albritton told Adams that she wanted the time Jackson left documented. Adams asked why and told Albritton that Jackson had done everything she should have done to leave early. Albritton said that Adams should document the matter.

Garner testified that the procedure for leaving work early was for the CNA to tell the charge nurse. The charge nurse would then tell the remaining CNAs. They tell the supervisor and the supervisor advises the coordinator. On October 5, 1996, the charge nurse reassigned Felicia Jackson's patients. Each of the remaining five CNAs were given two of Felicia Jackson's residents. Garner was told of the reassignment around 11:15 a.m. The charge nurse was B. J. Adams. Garner testified that was a normal occurrence.

Director of Nursing Sharon Albritton testified that the staffing coordinator, Emma Riddley, is directly responsible for staffing assignments. Riddley reports to Albritton. Albritton testified that Respondent's disciplinary policy may call for immediate action including discharge or may call for progressive discipline depending on the violation. That policy is called

the Employee Code of Conduct. All discharges have to be approved by the administrator.

Albritton testified that Felicia Jackson was discharged on October 7, 1996, because she left the facility without permission. On Saturday, October 5, Albritton was phoned by supervisor Annie Wilson. Wilson told Albritton that Felicia Jackson had left the facility without permission. Jackson had asked for permission to leave that day at 1 p.m., but she had left before lunchtime during the late morning. Albritton investigated the incident by talking with Jackson, Annie Wilson, B. J. Adams, Emma Riddley, Margaret Freeman and Elaine Lee. She met with Administrator Elaine Lee and Felicia Jackson on Monday October 7. At that time Jackson was discharged.

Albritton testified that other employees including LaBrenda West and Helen Funches had been fired because they left the facility without permission. She denied that Felicia Jackson's involvement with the Union had anything to do with her discharge. On cross-examination Albritton distinguished the case of Mary Bingham. Bingham had, according to Albritton, arranged for someone to work in her place without proper authorization. Even though Bingham left the facility without permission she did not leave her work unattended. One of the reasons why Jackson was fired again according to Sharon Albritton was that she left Respondent in a position where there was a "potential for the abandonment of patients."

Annie Wilson testified that she was the weekend supervisor at Respondent's facility on Saturday, October 5, 1996. She testified that Felicia Jackson came in at 8 a.m. and asked her if she could leave at 1 p.m. that day. Wilson told Jackson to get with her charge nurse (B. J. Adams), and if Jackson completed her work to get back with Wilson and they would talk about Jackson leaving at 1 p.m. Wilson did not have another occasion to talk with Felicia Jackson that day.

Wilson learned that Felicia Jackson clocked out at 11:01 a.m. without checking back with Wilson. She checked and found out that at least three of Felicia Jackson's patients had not been cared for before Jackson left.

Administrator Elaine Lee testified that she was called at her home on October 5, 1996, by Sharon Albritton. She told Albritton to fully investigate the incident of Felicia Jackson leaving early. She was present when Felicia Jackson was discharged on October 7, 1996.

Lee testified that Respondent had discharged other employees under circumstances similar to those involving Felicia Jackson including Jewel Steele. Respondent introduced Steele's separation notice which shows that Steele was discharged for insubordination and improper conduct in June 1995. The writeup on that document indicates that Steele refused to work in the south unit despite specific instructions from her supervisor. Steele told her supervisor that she would go home before she worked the south unit and was tired of this "damn shit." When her supervisor told her to clock out as she left the home Steele told the supervisor to "clock her out my damn self." Elaine Lee testified that several other employees were discharged. Those included Shirley Hudson who received a personnel action report on July 10, 1996, for leaving without permission. Also discharged was LaBrenda West who received a disciplinary action report on October 29, 1996, showing that

after telling the nurse she was going on break, West disappeared and had not returned as of November 2, 1996. Other discharges include Geanie Lewis, Helen Funches, Yolanda Hinton, Helen Fischer, Christian Stubway, and Sammie Blue. Geanie Lewis left because she was upset with a resident and said that she would not be back. Lewis received a personnel action report dated February 23, 1996, for leaving without permission. Helen Funches received a disciplinary report on March 5, 1996, for leaving without permission. The remarks on her report showed that she said her husband was sick and she left in the middle of her shift. Yolanda Hinton was disciplined for leaving without permission on January 23, 1996. Hinton said that she was going on break and did not return to finish the shift. Helen Fisher and Christian Stubway were terminated after both left but did not punch out. A personnel action report was issued to Sammie Blue showing that Blue reported to work earlier than her report date of February 5, 1995. Lee testified that Blue was discharged on January 30, 1996, because Blue left after reporting and she did not have permission to leave.

Elaine Lee denied that she knew about Felicia Jackson's membership or affiliation in the Union. She testified that the Union had nothing to do with Jackson's discharge. She testified that she never did see Felicia Jackson wearing a union button in the nursing home. She denied that she ever said anything to any employee including B. J. Adams, about Felicia Jackson's union activities.

Emma Riddley admitted that Mary Bingham was not discharged after she left work without permission. Instead, Bingham was counseled and given an employee counseling form dated August 28, 1996. That form included a comment that Bingham had left after replacing herself and untruthfully telling the nurse that Emma Riddley had given her permission to leave. Riddley wrote in that she had not given Bingham permission to leave early. Riddley testified that Bingham had actually phoned another CNA and had that person come in and replace Bingham before Bingham left. Bingham had not abandoned her patients.

Sharon Albritton testified that she did not recall that Felicia Jackson had received any warning prior to her discharge.

Albritton did not recall whether she learned of Felicia Jackson's union activity before or after her discharge.

Polly Darnall, the chief operating officer of Right Care, testified that she is unaware of any of Respondent's CNAs abandoning his or her patients without being discharged. She testified that Respondent was required to satisfy minimum staffing requirements from the state of no more than 10 patients per CNA during the 7 a.m. to 3 p.m. shift on October 5, 1996. She testified that when Felicia Jackson left the facility on October 5, that placed the remaining CNAs in noncompliance with the minimum staffing regulations.

#### Findings

#### Credibility

In consideration of the record and her demeanor I find that I am unable to fully credit the testimony of Emma Riddley. Her testimony that she did not notice any employees wearing union buttons was especially incredible. As shown above the record evidence illustrated that Respondent and its supervisors were aware of the employees' union activities.



In consideration of the full record and the witnesses demeanor I find that Felicia Jackson testified credibly. As shown below I found that she was mistaken in one regard. She recalled that she did not tell supervisor Wilson that she wanted to leave early at 1 p.m. on October 5, 1996. I am convinced that Jackson did tell Wilson that she wanted to leave at 1 p.m. Jackson did testify that she told Charge Nurse B. J. Adams that she wanted to leave at 1 p.m.

I fully credit B. J. Adams in view of her demeanor and the full record. Adams appeared to reply candidly to both direct and cross-examination. Her testimony regarding the incidents on October 5 are fully credited.

I am convinced that Virgie Jackson and Robert Ellis testified truthfully in view of their demeanor and the full record.

I do not credit the testimony of Sharon Albritton, Annie Wilson, or Emma Riddley to the extent their testimony conflicts with credited evidence in view of their demeanor and the record evidence. As shown above I discredited Albritton's denial that she interrogated Felicia Jackson about Jackson's union activities. I am convinced that she was not truthful in her testimony that she could not recall whether she knew of Felicia Jackson's union activities before Jackson's discharge.

I credit the testimony and other evidence showing that Felicia Jackson was the most active union supporter during Respondent's 1996 union organizing campaign. I find that the evidence shows that Respondent was aware of Jackson's activities and that Director of Nursing Sharon Albritton engaged in 8(a)(1) activity regarding Felicia Jackson's engaging in union activity at the nursing home. The evidence shows that Felicia Jackson left work early on both October 4 and 5, 1996, because of her sister's medical condition. On both occasions Jackson notified her direct supervisor before she left and on both occasions Jackson followed the directions of her immediate supervisor and normal procedure regarding leaving the home before the end of the shift.

#### Conclusion

As to whether Respondent illegally discharged Felicia Jackson, I shall consider whether the General Counsel proved through persuasive evidence that the Respondent acted out of antiunion animus *Manno Electric*, 321 NLRB 278 fn. 12 (1996); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The General Counsel cited *Adam Wholesalers*, 322 NLRB 313 (1966), in arguing that it had proved a prima facie case. General Counsel contended that the record proved that Respondent knew of Felicia Jackson's union activities, that Respondent demonstrated union animus and that the record proved that Respondent used pretextuous reasons to discharge Jackson.

The credited evidence shows that Felicia Jackson was deeply involved in union activities. She attended union meetings, signed an authorization card, solicited employees to sign authorization cards and had an 8(a)(1) conversation with Director of Nursing Sharon Albritton. The evidence shows that Respondent was aware of Jackson's union activities. In that regard I credit the testimony of Felicia Jackson showing that Sharon Albritton questioned her and discussed her union activities on

July 28, 1996, and I credit the testimony of B. J. Adams showing that Director of Nursing Albritton coupled the employees support of the Union with the discharge of Felicia Jackson during Adams meeting with Albritton on October 11, 1996.

Sharon Albritton phoned B. J. Adams on October 5 and asked her to write a statement regarding Felicia Jackson leaving early that day. For various reasons Albritton and Adams did not get together until October 11. Albritton called Adams at her station at 3 p.m. on October 11 and said that she wanted to see Adams. Adams went to Albritton's office and told her that she had an appointment and needed to leave that day. Albritton called and Elaine Lee came in the office. Albritton told Adams that her documentation of Felicia Jackson leaving early on October 5 did not include the time Jackson left and she asked Adams to rewrite the documentation. Adams said that she was not going to rewrite the documentation because she had written what had happened. Adams said that she would not write anything else but that she would put the times down. Adams did put down the times and gave the documentation back to Albritton. Albritton said that what these people don't know is the union is not here to help anyone, they're here to fatten their pockets and that employees would not be able to leave early like they could now. Adams said that she felt that Felicia Jackson was a victim of circumstances. Albritton said no she was not a victim of circumstances but Jackson was the one that's around here stirring up this union mess.

The record shows that Respondent demonstrated union animus by announcing its opposition to the Union, by engaging in 8(a)(1) activity and by Sharon Albritton coupling the discharge of Felicia Jackson with the employees union campaign.

I find that the General Counsel proved a prima facie case that Felicia Jackson was discharged because of her union activities. The General Counsel also argued that the evidence proved that Respondent used a pretextuous reason for Jackson's discharge.

As shown above on Friday, October 4, Jackson left the nursing home before the end of her shift. On that occasion Jackson told Staffing Coordinator Emma Riddley what had occurred and that she needed to leave. Riddley told Jackson to take care of her residents and to tell her coworkers and her charge nurse that she was leaving.

On weekends the staffing coordinator is frequently not at the nursing home. That was the situation on Saturday, October 5. In her place was a weekend supervisor, a RN, Annie Wilson. Wilson served in place of the staffing coordinator for purposes of anyone wanting to leave early.

When Felicia Jackson arrived on Saturday, October 5, she did essentially what she had done on Friday, October 4. She first advised Charge Nurse B. J. Adams, then supervisor Annie Wilson that she needed to leave early at 1 p.m. She then did her work with her residents and told the other CNAs that she was leaving early. Between 10 and 11 a.m. Felicia Jackson told Charge Nurse B. J. Adams that she needed to leave earlier than 1 p.m. and would leave after completing resident King. She asked the other CNAs to care for her residents. As she was leaving Jackson looked for B. J. Adams but Adams was not at the nurses' station. Instead of Adams she told Charge Nurse Freeman that she was leaving. All the above evidence is credited. Some of it is not disputed. For example it is not disputed

that Felicia Jackson told other CNAs that she was leaving and that she asked those CNAs to care for Jackson's residents. It is also undisputed that Jackson told both B. J. Adams and Ms. Freeman, the two charge nurses, that she was leaving after finishing with King.

Nevertheless Director of Nursing Albritton testified that Felicia Jackson's early departure left the potential for patient abandonment. Her personnel action evidencing separation shows that Jackson was separated for leaving without permission and violation of company rules.

The credited evidence shows that there was no question of patient abandonment. Felicia Jackson asked other CNAs to care for her patients and they agreed. She told Charge Nurses Adams and Freeman that she was leaving earlier than 1 p.m. and both agreed to her leaving. Earlier that day she had cleared her leaving before the end of her shift (despite the fact that at that time she planned to leave at 1 p.m.), with the overall weekend supervisor, RN Annie Wilson.

Against that background I agree with the General Counsel. Respondent's contention that Felicia Jackson left it with the potential for patient abandonment; that Jackson left without permission and that Jackson violated company rules, was a pretext. Jackson did none of those things.

Additionally, there is more evidence supporting a finding of pretext. The credited testimony shows that Felicia Jackson was told of her discharge at the very beginning of her October 7 meeting with Elaine Lee and Sharon Albritton. Lee and Albritton did not give Jackson an opportunity to explain her October 5 actions. Emma Riddley testified that Respondent had decided to discharge Jackson before she phoned Jackson on the evening of October 5. Riddley testified that Sharon Albritton had told her that "it was abandonment and leaving without permission, and it would be automatic termination." However, as shown herein, Respondent continued to conduct an investigation until several days after Jackson was told of her discharge.

In consideration of whether Respondent would have discharged Jackson in the absence of her union activities I find that the record showed that Respondent has discharged some employees for leaving work without permission. Several of those situations are clearly distinguishable from the case of Felicia Jackson. Jewel Steele was shown to have been discharged for insubordination and improper conduct. Jackson was not shown to have engaged in either insubordination or improper conduct. LaBrenda West told a charge nurse that she was going on break and disappeared. She had not returned to work days later when she was formally discharged. Yolanda Hinton also left after saying she was going on break. Helen Fisher and Christian Stubway left without punching out. Those cases were not similar to the Felicia Jackson situation. Geanie Lewis said as she left that she would not be back. Again that was different from the situation with Felicia Jackson. Two employees, Helen Funches and Sammie Blue were apparently discharged for leaving without permission.

Emma Riddley testified that CNA Mary Bingham was not discharged even though Bingham left work without permission. Instead Bingham was counseled. Bingham, unlike Felicia Jackson, left after being untruthful. She said that Emma Riddley had given her permission to leave when Riddley had not given per-

mission. Bingham was Respondent's observer during the NLRB election.

The credited evidence showed that Felicia Jackson did not engage in any misrepresentation.

Respondent argued that the evidence showed that when Jackson left on October 5 the other CNAs by taking the extra load left with Jackson's patients, exceeded the state regulation allotment of 10 patients per CNA. The record failed to show that such was the case. There was no evidence showing the actual number of patients per CNA on October 5.

I find that by showing that only two of the several instances of discharge, may have involved discharge for a situation that could be favorably compared with that of Felicia Jackson does not prove that Respondent would have discharged Jackson in the absence of her union activities in view of the evidence of pretext, the showing that in similar instances other employees were not discharged and the strong prima facie case. *Pitt Ohio Express*, 322 NLRB 867 (1997).

I find that the General Counsel proved that Respondent was motivated by her union activities to discharge Felicia Jackson, that Respondent engaged in pretext in an effort to hide the true reason for Jackson's discharge and that Respondent failed to prove that it would have discharged Felicia Jackson in the absence of her union activities.

#### C. The 8(a)(1) Allegations

##### Discharged Supervisor Bettye Adams

Sharon Albritton testified that B.J. Adams was discharged because she failed to attend an October 15, 1996 meeting. Adams had been called to meet and discuss Adam's change in her own work schedule without following the proper procedure. B. J. Adams was scheduled to work on October 7 but she switched her work assignment with another LPN, Tish Johnson. On October 11 Albritton spoke to B. J. Adams about Felicia Jackson leaving the facility without permission. Albritton phoned Adams on October 5 and asked her to write a statement regarding Felicia Jackson leaving early. Subsequently in a meeting with B. J. Adams and Elaine Lee, Albritton asked Adams to clarify her prior statement regarding Felicia Jackson leaving the facility. However, Adams left that meeting before making a clarifying statement. She said that she had another appointment and had to leave.

B. J. Adams testified that she was scheduled to work on October 7, 1996, but that she switched out with another nurse, Ms. Johnson. Adams was working two jobs at the time and trying to go to school. She needed that day off to get ready for a test at school that night. Adams testified that her supervisor Annie Wilson was present when Johnson agreed to work in Adams' place on October 7. That conversation occurred at the nursing home on October 6. Wilson said to Johnson, "Tia, so you're going to work for B. J. in the morning, and she said yes. B. J., you're going to be off right?" Adams replied that she was going to be off and Wilson said okay.

Even though she did not work that day Adams attended a meeting called by Director of Nursing Albritton. Margaret Carson and two other nurses and a RN were at the meeting along with Adams and Albritton.

Adams was off work on October 8 and 9 as well as on October 7, 1996. She next returned to work on October 10. Adams had received messages to phone Sharon Albritton but she did not contact Albritton until she returned to the nursing home for work on October 10. Adams reported to Albritton but Albritton was tied up the entire day. Albritton called her station at 3 p.m. on October 11 and said that she wanted to see Adams. Adams went to Albritton's office and told her that she had an appointment and needed to leave that day. Albritton called and Elaine Lee came in the office. Albritton told Adams that her documentation of Felicia Jackson leaving early on October 5 did not include the time Jackson left and she asked Adams to rewrite the documentation. Adams said that she was not going to rewrite the documentation because she had written what had happened. Adams said that she would not write anything else but that she would put the times down. Adams did put down the times and gave the documentation back to Albritton. Albritton said that what these people don't know is the Union is not here to help anyone, they're here to fatten their pockets and that employees would not be able to leave early like they could now. Adams said that she felt that Felicia Jackson was a victim of circumstances. Albritton said no she was not a victim of circumstances but Jackson was the one that's around here stirring up this union mess. Adams admitted that she knew that Jackson actively supported the Union while she worked for Respondent.

On October 14 Adams gave prepared another document and gave it to Albritton (GC Exh. 12). After work that day, around 5 p.m., Emma Riddley phoned Adams and told her to not report for work the next day. Instead she instructed Adams to meet with Lee and Albritton. However, Adams did not attend the meeting with Lee and Albritton on October 15. She testified that she was tired of the whole matter.

On October 17 Adams phoned Albritton and asked what they had decided. Albritton told her that she had been terminated for a no-call, no-show to a mandatory meeting.

Adams testified that it was not until she attended an employment security hearing that she first heard that she was discharged because she changed out her October 7 work assignment with Johnson.

#### Findings

At the conclusion of the General Counsel's case I granted Respondent's motion to dismiss the allegations that Respondent illegally discharged B. J. Adams. The General Counsel requested that I reconsider my ruling.

As shown in the transcript I made the decision to dismiss the allegations that Respondent discharged B. J. Adams on October 17, 1996, because Adams refused to commit unfair labor practices. In making that determination I assumed for the sake of considering Respondent's motion that the General Counsel had shown that Respondent had discharged Felicia Jackson because of Jackson's union activities.

The record evidence most favorable to the General Counsel shows that Respondent supervisor Sharon Albritton asked B. J. Adams to "clarify" her prior statement regarding Felicia Jackson leaving the facility early and to rewrite the prior statement because that prior statement did not include the time that

Felicia Jackson left the facility on October 5, 1996. The record shows that Adams did submit a second written statement and that she was not asked to do anything further in regard to the investigation of the matters leading to the discharge of Felicia Jackson.

B. J. Adams testified that she learned at an employment security hearing that Respondent had discharged her because she exchanged work assignments with another nurse for October 7 without following proper procedure. Evidence introduced through Sharon Albritton showed that Respondent contends that Adams was discharged because she failed to attend a meeting with Albritton and Elaine Lee to discuss her October 7 work exchange. Adams admitted that she did exchange work assignments and she admitted that she did not attend an October 11 meeting with Albritton and Lee despite being told to be at the meeting.

After resting and after I ruled in favor of Respondent's motion to dismiss as to the B. J. Adams allegations, I denied the General Counsel's request to put on evidence of disparity in the treatment of Adams.

In view of the entire record I find that my decision to dismiss the allegations regarding the termination of B. J. Adams should stand. The General Counsel failed to make a prima facie case that Respondent discharged B. J. Adams because Adams refused to engage in an unfair labor practice.

#### Bargaining Order

It is alleged that a bargaining order should issue holding the Union to be the exclusive collective-bargaining representative of Respondent's employees,

Including: All full-time and regular part-time service and maintenance employees, including CNA (nurses aides), housekeeping employees, laundry employees, dietary employees, and janitor/maintenance employees employed by Respondent at its 1600 Raymond Road, facility;

Excluding: All other employees, including LPNs, RNs, technical employees, professional employees, clerical employees, guards and supervisors as defined in the Act.

Respondent admitted that the above-described bargaining unit is an appropriate unit within the meaning of Section 9(b) of the Act.

A list of employees on Respondent's payroll for the period September 1 through 15, 1996, including Patricia Strayly and Jacqueline a/k/a Jackie Morris, was received in evidence as General Counsel's Exhibit 9.

Union Organizing Director Robert Ellis testified that the campaign in Mississippi started in July 1996 and involved 12 nursing homes in the Jackson, Mississippi area. Felicia Jackson was the only employee from Respondent to attend one of the first union meetings in Jackson. Ellis gave Felicia Jackson one of the Union's organizing packets that included a know your rights document, some documents from the NLRB about conducting a fair election, an authorization card and a new initiation dues card.

Ellis explained to Felicia Jackson that the authorization cards were the employees' authorization for the Union to represent them and that an employee did not become a member of the

Union by signing the authorization card. He showed her a membership application and discussed how it differed from the authorization card. Ellis told Felicia Jackson that when she solicited employees to sign authorization cards she should explain the difference between authorization and membership application cards. During the campaign Ellis received a number of signed authorization cards from Felicia Jackson. The cards were returned to the union hall in Jackson.

Linda Charlton, a secretary for the Union, testified that she received mail on behalf of the Union. Charlton testified that she frequently received union signed authorization cards in the mail. She identified the General Counsel's Exhibits 136 as an example of the cards she has received showing her initials and a date stamp. She filed the cards in the file cabinet and maintained a list of the employees represented in the cards. When Union Representative Rose Turner filed a petition involving Respondent with the NLRB Charlton gave all the union authorization cards to Turner. Charlton testified that she also received some cards from union representatives in the Jackson UFCW office.

Union Representative Rose Turner testified that she received all the union authorization cards signed by some of Respondent's employees from Linda Charlton. Turner turned those cards into the NLRB along with the Union's representation case petition.

Union Representative Barbara Dotson participated in the union organizing campaign at Respondent's facility during 1996. She assisted Union Agent Bob Ellis. Milton Jones also worked as union coordinator during that campaign. Dotson received some signed union cards from Felicia Jackson. She testified that the initials B. D., F. J., and B. E. on various authorization cards stand for Barbara Dotson, Felicia Jackson, Milton Jones, and Bob Ellis.

Milton Jones, International union representative, testified that he coordinated the 1996 campaign at Respondent's facility. Jones testified that Felicia Jackson was the employee that was responsible for signing the large majority of those employees that signed union authorization cards. Felicia Jackson attended more union meetings than any other employee. She attended a majority of the Union's meetings.

Elijah Lovett, who is employed by the Local Union, testified that he mailed union authorization cards signed by Respondent's employees to the union office in Memphis, Tennessee. He was given the cards by union employees Barbara Dotson, Bob Ellis, and Milton Jones.

Dequoida Kees identified a union authorization card that she signed on July 29, 1996. She signed a second union authorization card on August 1, 1996. Kees testified that she is not currently working for Respondent and that she is under suspension. She started working for Respondent in June 1996.

Doreen Gilbert identified two union authorization cards as cards signed by her. The second card was given to her by Felicia Jackson as she was leaving work. Gilbert asked Jackson for an authorization card. Jackson told her they were trying to get the Union in at the facility. She asked Gilbert to read the card along with a pamphlet she gave Gilbert. Gilbert is still employed by Respondent.

The parties stipulated to the authenticity of the union authorization card of Mary Quinn. Quinn testified that she read the card before signing it.

Lillie Taylor identified the General Counsel's Exhibit 143(a) as a union authorization card signed by her. She testified that she read the card before she signed it and that she mailed the card. Taylor testified that she also signed a second union authorization card (GC Exh. 143(b)) and returned that card to Felicia Jackson. She also read that card before signing. Taylor testified that at some point either before or after she signed 143(b), Felicia Jackson told her that by signing the card she had obligated herself to vote for the Union.

Mary Williams testified that she has worked for Respondent on and off since 1989 in housekeeping. Williams identified General Counsel's Exhibit 146 as a union authorization card she signed and mailed back to the Union. Williams testified that she read the card before signing.

Mae Etta Garner identified a union authorization card signed by her as the General Counsel's Exhibit 117. She read the card before she signed it. After signing the card she returned the card to Felicia Jackson.

Virgie Jackson has worked for Respondent as a rehab CNA for about 2 years. Ms. Jackson identified an authorization card as one she signed after reading it. It was received in evidence as the General Counsel's Exhibit 124. Virgie Jackson saw Felicia Jackson wear a union button at work. Felicia Jackson wore her union button just below her nametag.

Rowena McClain, a CNA, identified a union authorization card she signed after reading the card. She returned the card to Felicia Jackson (GC Exh. 132).

Felicia Jackson identified union authorization cards as having been signed by employees Ada Adams (GC Exh. 101), and cards of other employees (GC Exhs. 102-113, 115-116, 119-123, 125, 127-131, 133-135, 138-142, 145, 147, and 148).

I also received the authorization cards of Debra Randle and Tracy D. Taylor by comparing the signatures on those cards with the respective state withholding and Federal W-4 signatures.

#### Findings

The record established that more than 42 different employees in the appropriate bargaining unit submitted signed authorization cards to the Union on or before September 2, 1996. The General Counsel's Exhibit 9 proved that Respondent had no more than 72 employees in the appropriate bargaining unit during the period from September 1 through 15, 1996.

There was no credible evidence that established that any of the union authorization cards were not valid. Two employees, Doreen Gilbert and Lillie Taylor, testified as to what they believed they were required to do as a result of their signing an authorization card. I am persuaded that credible evidence shows that employee were not misled into signing authorization cards. I credit the testimony of Felicia Jackson to the extent there are conflicts in what employees were told about the cards. The card language shows that the signer is authorizing the Union to be his or her representative for purposes of collective bargaining. See *DTR Industries*, 311 NLRB 833, 839 (1993); *Action Auto Stores*, 298 NLRB 875, 881 (1990), *enfd. mem.* 951 F.2d 349

(6th Cir. 1991). I find on the basis of that evidence that the Union represented a majority of the bargaining unit employees on September 2, 1996.

General Counsel contended that Respondent has committed numerous egregious unfair labor practices which are so serious and substantial in character, that the possibility of conducting a fair rerun election by use of traditional remedies is slight, at best. That the employees' sentiments regarding representation having been so clearly expressed, as shown by the demonstrated card majority of 58.3 percent, those employees would be best protected by the issuance of a bargaining order.

As shown herein I have found that Respondent engaged in the following unfair labor practices. In August 1996, Respondent through its director of nursing, Sharon Albritton, implemented an illegal no-solicitation/no-distribution rule, disparately applied its no-solicitation/no-distribution rule against union activities, threatened an employee with discipline if the employee continued to solicit or distribute for the Union and unlawfully interrogated an employee about union activities.

In early October 1996, Respondent through its staffing coordinator, Emma Riddley, threatened employees with adverse changes in working conditions if the employees selected the Union as their collective-bargaining representative.

On October 7, 1996, Respondent discharged its employee Felicia Jackson because of Jackson's union activities.

Discharges have been held to constitute "hallmark" violations of the Act which may warrant the issuance of a bargaining order. *Adam Wholesalers*, 322 NLRB 313 (1996); *Flexsteel*, 228 NLRB 136 (1977); *Ultra-Sonic De-Burring*, 233 NLRB 1060, 1068 (1977).

However, this case does not include the numerous illegal actions found in other cases including *Adam Wholesalers*, supra. There was a hallmark violation in the illegal discharge of Felicia Jackson on October 7, 1996. I also found that two of Respondent's supervisors, Director of Nursing Sharon Albritton and Staffing Coordinator Emma Riddley, engaged in illegal conduct. All the unfair labor practices occurred in August and October. The several 8(a)(1) violations committed by Sharon Albritton all occurred in August 1996. Subsequently, no other violations occurred until October. On October 7 Respondent illegally discharged the leading union advocate Felicia Jackson. Also in October Emma Riddley threatened employees with adverse working conditions if they selected the Union.

As to those illegal activities the discharge of Felicia Jackson most likely had a pervasive impact on the unit employees. The 8(a)(1) violations by Sharon Albritton were limited to comments to Felicia Jackson. As shown above, the comments by Emma Riddley were made to several employees.

The evidence illustrated serious and persuasive misconduct. However, it was more restricted than that found in any case where a bargaining order issued. The misconduct was not shown to have emanated from upper level management and no misconduct occurred after October 1996. The NLRB election was held on November 8, 1996, and the Union came within three votes of winning.

The record shows that the union campaign was run almost single handedly by Felicia Jackson. She was discharged on October 7 and the election was held a month later on November

8, 1996. Despite the fact that the Union was without its primary campaigner for that one month before the election, the Union achieved almost 50 percent of the vote. If this order stands and another election is held the new election will be held after Felicia Jackson is offered reinstatement. I am not convinced that under those circumstances a fair rerun election could not be held.

With those facts in mind I am not persuaded that the possibility of erasing the effects of the Respondent's unfair labor practices is slight and that holding a fair rerun election is unlikely.

I find that the unfair labor practices which did occur during the critical period between the September 16 petition and the November 8 election, constitute objectionable conduct. That objectionable conduct included the 8(a)(1) comments by Emma Riddley and the 8(a)(1) and (3) October 7 discharge of Felicia Jackson. I recommend the election be set aside and that this matter be remanded to the Regional Director to conduct a rerun election.

### CONCLUSIONS OF LAW

1. P H Nursing Home, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 1529 is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by coercively interrogating its employees about their union activities; by implementing and disparately applying an illegal no-solicitation/no-distribution rule; by threatening its employee with discipline if the employee solicited or distributed for the Union on Respondent's premises; and by threatening its employees with adverse changes in working conditions if they select the Union as their representative; has engaged in conduct violative of Section 8(a)(1) of the Act.

4. Respondent by discharging and refusing to rehire Felicia Jackson because of her union activities has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

### THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has illegally discharged Felicia Jackson in violation of sections of the Act, I shall order Respondent to offer Felicia Jackson immediate and full employment to her former job or, if that job no longer exists, to a substantially equivalent position. I further order Respondent to make Felicia Jackson whole for any loss of earnings she suffered as a result of the discrimination against her and remove from its records any reference to the unlawful actions against Felicia Jackson and notify Jackson in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as de-

scribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

The Respondent, P H Nursing Home, Inc., Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their union activities.

(b) Implementing and disparately applying an illegal no-solicitation/no-distribution rule against its employees because those employees are engaged in union activities.

(c) Threatening its employees with discipline if the employee solicited or distributed for the Union on Respondent's premises.

(d) Threatening its employees with adverse changes in working conditions if the employees select the Union as their representative.

(e) Discharging and refusing to reemploy its employees because of their union or other protected activities.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days of this Order, offer Felicia Jackson immediate and full employment to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her plus interest, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to its unlawful discharge of Felicia Jackson, and within 3 days thereafter notify Felicia Jackson in writing that this has been done and that the discharge will not be used against her in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, and timecards, personnel records, reports, and all other records necessary to analyze the amount of backpay due under the terms of this order.

(d) Post at its facility in Jackson, Mississippi, copies of the attached notice.<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the

Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director, for Region 26, in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

#### APPENDIX

#### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize  
To form, join, or assist any union  
To bargain collectively through representatives of their own choice  
To act together for other mutual aid or protection  
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their membership in United Food and Commercial Workers Union, Local 1529, or any other labor organization.

WE WILL NOT implement or apply a no-solicitation/no-distribution rule which discriminatorily restricts employees' union activities.

WE WILL NOT threaten our employees with disciplinary action if those employees solicit or distribute for the Union on Respondent's premises or during working hours.

WE WILL NOT threaten our employees with adverse changes in working conditions if the employees select the Union as their bargaining representative.

WE WILL NOT discharge our employees because of their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days of this Order, offer Felicia Jackson, immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position without prejudice.

WE WILL make Felicia Jackson whole for any loss of earnings and other benefits resulting from our discriminatory actions, less any net interim earnings, plus interest.

P H Nursing Home, Inc.

<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."